D.C. CIRCUIT RULING CANNOT BE RECONCILED WITH SUPREME COURT'S INTERPRETATION OF THE 1996 ACT

The decision of the U.S. Court of Appeals for the D.C. Circuit overturning the FCC's network unbundling and line sharing rules (*USTA v. FCC*) cannot be reconciled with the Supreme Court's interpretation of the Telecommunications Act of 1996 in *Verizon v. FCC*. The high court recognized that the 1996 Act was intended to "achieve the entirely new objective of uprooting the monopolies that [prior schemes] had perpetuated," and so upheld the FCC's pricing and combination rules for unbundled network elements. The appeals court decision has misread the Act, Congressional intent, and the state of the marketplace, as a comparison of the two opinions makes clear.

Effect of Unbundling Rules on Bell Investments

- ***Supreme Court.*** The FCC's UNE pricing rules ***do not*** impede investments by the Bell companies. To the contrary, the incumbents' investments of over $100 billion since 1996 "affirms the commonsense conclusion that so long as [the rules] bring[] about some competition, the incumbents will continue to have incentives to invest and improve their services to hold on to their existing customer base."

  The Bells' argument that the rules prevent them from recovering the costs of investment "rests upon a fundamentally false premise," since any underdepreciation of existing facilities alleged by the Bells "was undertaken largely by the incumbents themselves . . . as a means to keep the rate base inflated," and "there is no reason to allow them further recovery through wholesale rates."

- ***DC Circuit.*** The FCC's rules requiring the Bells to lease network elements at rates "below historic costs" reduced the incumbents' incentives to invest in facilities, because the Bells would have to share the "rewards" with competitive providers.

Effect of Unbundling Rules on CLEC Investment

- ***Supreme Court.*** Evidence of "actual investment in competing facilities since the enactment of the Act simply belies the [argument that allowing UNE-based competition removes competitors' incentives to invest in their own facilities]." The Court specifically declined to evaluate whether investment would have been more robust under a different regulatory scheme, holding that the Court "ha[s] no idea whether a different [regulatory] scheme would have generated even greater competitive investment ... but it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities."

- ***DC Circuit.*** Evidence of competitive investment in facilities "tells us little or nothing" about the effect of the unbundling rules on facilities-based competition, since the question is "what [investment] would have occurred in the absence of the prospect of unbundling."

Promoting Competition Through the Unbundling of Network Elements

- ***Supreme Court.*** Congress "addresse[d] the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue," one of which was to require incumbents "to lease elements of their networks at rates that would attract new entrants when it would be more efficient to lease than to build or resell." The elements for which demand will be highest are the "costly bottleneck elements, duplication of which is neither likely nor desired."

- ***DC Circuit.*** "[C]ompetition performed with ubiquitously provided ILEC facilities" does not "count" because it is "completely synthetic."

Status of Competition in the Telecommunications Marketplace

- ***Supreme Court.*** The Bell companies are "incumbent monopolists" that "have almost an insurmountable competitive advantage" over new competitors, who could not compete "without coming close to replicating the incumbent's entire existing network."

- ***DC Circuit.*** Because the FCC has found that "[n]umerous companies," including cable companies, wireless companies and utilities, are "starting to deploy, or plan to deploy . . . broadband," there is no need to unbundle the upper frequencies on a copper loop to allow competitors to provide high speed services.

FCC Obligation to Adopt Rules to Maximize the Availability of Unbundled Network Elements

- ***Supreme Court.*** Congress designed the 1996 Act "to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property," and therefore the Commission's role is "to put a competing carrier on an equal footing with the incumbent." The Court quoted Senator Breaux's 1995 floor statement putting the Bells on notice that under the legislation's unbundling requirements "you will not control much of anything."

- ***DC Circuit.*** In determining whether access to a particular UNE was required, the FCC should not have relied on cost disparities that might occur between a new entrant and an incumbent in any industry (*e.g.*, economies of scale), because such an approach was "too broad . . . to be reasonably linked to the purpose of the Act's unbundling provisions."

FCC Obligation to Recognize the Disparities Between CLECs and the Bells

- ***Supreme Court.*** The Act must be read to further the goal of competition between unequal players:

> If Congress had treated incumbents and entrants as equals, it probably would be plain enough that the incumbents' obligations stopped at furnishing an element that could be combined. The Act, however, proceeds on the understanding that incumbent monopolists and contending competitors are unequal . . . .

The FCC's rules achieved the "practical result" Congress sought -- *i.e.*, promoting local competition to the greatest extent possible.

- ***DC Circuit.*** In deciding whether to allow access to a particular network element, the Commission should have balanced the interests of the ILECs against those of the CLECs. The DC Circuit relied on Justice Breyer's concurring opinion in *Iowa Utilities Board* -- not the majority view in that case, and not the view of the majority in *Verizon* -- to conclude that balancing the ILECs' and CLECs' competing concerns was "implicitly" required by the majority of the Supreme Court in that case.

Factual Support Required for FCC Rules

- ***Supreme Court.*** Given Congress's broad objective to promote local competition, the question on review was only "whether the Commission made choices reasonably within the pale of statutory responsibility in deciding what and how items must be leased."

- ***DC Circuit.*** The DC Circuit can't make up its mind. It criticizes the Commission for adopting unbundling rules "without regard to the state of competitive impairment in any particular market," but then overturns line sharing based on vague projections by the FCC about prospective competition in broadband. Neither approach conforms to the Supreme Court's standards.